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No. 88-1039

Supreme Court, U.S.
FILED
MAY 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM FRENCH SMITH, *et al.*,
Petitioners,

v.

ANTHONY J. PRISCO, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MEMORANDUM OF RESPONDENT ON THE QUESTION OF MOOTNESS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MEMORANDUM OF RESPONDENT ON THE QUESTION OF MOOTNESS

Pursuant to the Court's request, respondent submits the following memorandum on the question of mootness.

Originally, the Department of Justice petitioned this Court, asking for review of two issues: (1) the appealability of an order finding that petitioners were not entitled to qualified immunity; and (2) whether the lower court correctly held that no such immunity existed in this case. Respondent Prisco responded by noting that a conflict among the circuits existed with respect to the

former issue, but that no issue worthy of this Court's attention was raised by the second issue. Accordingly, respondent urged this Court to deny the petition, or in the alternative grant the petition with respect to the first issue only.

In response to this Court's request that the parties address the issue of mootness, the Department of Justice now urges the Court to grant the petition only with respect to the second issue. It argues that the first question is moot in two respects. First, two of the petitioners are no longer in positions capable of authorizing the prospective relief sought by respondent. The Department of Justice argues, second, that because respondent's daughter has now been removed from the Witness Protection Program, the appealability of the lower court ruling is no longer worthy of review. Respondent concurs in this conclusion that the first issue is moot. While respondent's daughter was not formally terminated while this case was pending in the lower court, it is clear that she is now no longer in the program.

Respondent does not agree, however, that the Court should grant the petition with respect to the second issue —the merits of the determination that petitioners lack qualified immunity. Clearly, the second issue is not moot. Respondent's claim for damages is not extinguished simply because respondent's daughter has now been removed from the Program. Nevertheless, that issue hardly deserves this Court's attention. As we previously argued, the only question raised by the second issue is of little importance to anyone other than the parties to this case. Because that question—the exact state of the law existing when respondent's family was taken into the Program —is exceedingly narrow, review is not warranted.

Petitioners fail to adequately answer that problem, but instead argue that review is warranted since the court of appeals would obviously rule against them "in light of

the court's earlier ruling with regard to petitioner Smith." Gov't Memo at 4. While that may be true, that hardly presents an adequate basis for granting review. Furthermore, petitioners have not shown that the lower court's ruling is erroneous.

Consequently, the Court should deny the petition.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM REGARDING MOOTNESS

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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REPLY MEMORANDUM REGARDING MOOTNESS

Respondent has mischaracterized our submission in two respects.

1. We did not argue that the first *question* in our petition is moot. Rather, we argued that because Lauren Prisco was not in the Witness Protection Program when the court of appeals entered judgment, respondent's *claim for prospective relief* was moot at that time; thus, the court of appeals erred in dismissing the appeals of petitioners Meese and Morris even under its own rationale. And the first question is still alive as to petitioner Morris, because he is still the Director of the Marshals Service.

2. We did not argue that the petition should be granted only on the second question. Rather, we suggested that the court of appeals' error on the first question was sufficiently clear that plenary review of that question may be unnecessary. We then asked the Court to grant the petition in its entirety and defer any remand with respect to

the appeals of petitioners Meese and Morris until the Court has resolved the second question with respect to petitioner Smith.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MAY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00248